Supreme Court, U.S.
FILED
MAY 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1454

In the Supreme Court of the United States

OCTOBER TERM, 1986

REBEL ANN MAYS AND EVERETT F. MAYS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that benefits received by servicemen and their dependents under the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), 10 U.S.C. 1079, 1331; 32 C.F.R. 199.3(b), are a collateral source for which the United States is not entitled to a set-off against damages awarded under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2674.

1. Petitioner Rebel Ann Mays, now deceased, was the wife of petitioner Everett Mays, who served for 21 years in the United States Air Force. Mrs. Mays was treated for cancer by physicians and other personnel at the Fitzsimons Army Medical Center. In a suit filed under the FTCA, petitioners alleged that the Medical Center's personnel were negligent in their diagnoses and treatment of Mrs. Mays's cancer. Pet. App. 6a. Following a trial, the district court entered judgment in favor of the petitioners and awarded

damages in the amount of $504,300, including $266,300 in medical expenses (*id.* at 6a-21a).

Because Everett Mays had served 21 years in the armed services, Mrs. Mays was entitled to have a portion of her medical expenses paid by the government under the CHAMPUS program. The CHAMPUS program, which provides medical benefits to, inter alia, dependents of retired members of the armed services who performed at least 20 years of service, is funded through the general treasury of the United States. Beneficiaries make no monetary contribution to the fund. See 32 C.F.R. 199.1(e); Pet. App. 3a-4a.[1] The parties in this case stipulated at trial that $195,055 of the $266,300 in medical expenses incurred for Mrs. Mays's care was paid by the United States under the CHAMPUS program (Pet. App. 16a).

2. The district court, in analyzing the effect of the CHAMPUS payments on the damage award, held that since such payments were "furnished under legislation wholly separate and distinct from recovery under the Tort Claims Act," they were a "collateral source" and therefore could not be offset against the damage award (Pet. App. 18a-20a).

The court of appeals reversed (Pet. App. 1a-5a). It ruled that the CHAMPUS payments were not from a collateral source because the funds for the program were obtained from general revenues and not from contributions by recipients (*id.* at 3a-4a). The court rejected petitioners' claim that military service constitutes a contribution to the program, noting that such service "is not the type of contribution required by the collateral source rule" (*id.* at 4a). The court

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[1]As the applicable regulation states, the funds for the program "are appropriated funds furnished by the Congress through the annual appropriation acts for the Department of Defense and the DHHS [Department of Health and Human Services]" (32 C.F.R. 199.1(e)).

pointed out that petitioner Rebel Mays "received CHAMPUS benefits because of her husband's *status*, not because of a monetary investment" (*ibid.* (emphasis in original)). The court concluded that "[t]o award damages for a loss for which the United States has already compensated the plaintiffs would be to allow a double recovery" (*id.* at 5a).

3. Petitioners assert (Pet. 7-14) that the court of appeals erred in holding that CHAMPUS benefits are not a collateral source to a damage award under the FTCA. Contrary to petitioners' assertion, however, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

a. We note at the outset that petitioners have not explained why the issue they raise is sufficiently important to warrant further review. The present case is apparently the first court of appeals decision to address the question whether CHAMPUS benefits constitute a collateral source to a damage award under the FTCA. And apart from the district court opinion in the present case, we have located only three district court cases raising the question. This almost complete absence of reported cases on the subject suggests that review by this Court is unnecessary.

b. In any event, the court of appeals' ruling is correct. The decision is in accord with the general rule that government-furnished benefits will not be deemed a "collateral source" when such benefits are provided from general funds of the United States rather than from monetary contributions by the beneficiary.

The question of whether government benefits can be offset against a damage award under the FTCA is answered by reference to state law governing the tort suit. 28 U.S.C. 1346(b); *Richards* v. *United States*, 369 U.S. 1 (1962); see

Berg v. *United States*, 806 F.2d 978, 984 (10th Cir. 1986). The Supreme Court of Colorado, whose law governs this suit, has interpreted the collateral source rule of that state to mean that " 'compensation or indemnity received by an injured party from a collateral source, wholly independent of the wrongdoer and to which [the wrongdoer] has not contributed, will not diminish the damages otherwise recoverable from the wrongdoer.' " *Steckler* v. *United States*, 549 F.2d 1372, 1379 (10th Cir. 1977) (quoting *Kistler* v. *Halsey*, 173 Colo. 540, 545, 481 P.2d 722, 724 (1971)). In the present case, it is undisputed that the CHAMPUS payments awarded to Mrs. Mays were paid out of general revenues and not from a fund to which her husband had made a monetary contribution. Accordingly, a failure to offset the FTCA award by the amount of the benefits provided Mrs. Mays under the CHAMPUS program would, as the court of appeals observed (Pet. App. 5a), "allow a double recovery" against the government.[2]

Contrary to petitioners' suggestion (Pet. 7-13), there is no conflict among the circuits on the issue presented in this case. As noted, the present case is apparently the first court of appeals decision to address the issue whether CHAMPUS benefits are a collateral source to an FTCA damage award. Petitioners cite one district court decision holding

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[2]Government-administered benefits may, of course, constitute a collateral source. For instance, in *Berg* v. *United States, supra*, the court held that certain Medicare benefits paid from the Federal Hospital Insurance Trust Fund could be considered a collateral source. In contrast to the present case, however, the fund in *Berg* was supported in large part by Social Security taxes imposed on employers and employees (806 F.2d at 985). See generally *Siverson* v. *United States*, 710 F.2d 557, 560 (9th Cir. 1983) (emphasis in original) ("Courts distinguish between those benefits that come from unfunded general revenues of the United States (deductible) and those that come from 'a special fund supplied *in part* by the beneficiary or a relative upon whom the beneficiary is dependent' (nondeductible)." (quoting *United States* v. *Harue Hayashi*, 282 F.2d 599, 603 (9th Cir. 1960)).

that CHAMPUS benefits constitute a collateral source (Pet. 8 (citing *Mooney* v. *United States*, 619 F. Supp. 1525 (D.N.H. 1985)).[3] Since the First Circuit has not considered the correctness of the analysis in *Mooney*, however, there is no conflict warranting review by this Court.[4] In the only other district court decisions we have found that have specifically considered the applicability of the collateral source rule to CHAMPUS payments in an FTCA action, the courts have held that CHAMPUS benefits are *not* a collateral source. *Diaz* v. *United States*, Civ. No. 85-799-N (LEXIS slip op.) (E.D. Va. Mar. 11, 1987); *Burke* v. *United States*, 605 F. Supp. 981 (D. Md. 1985).

The two other cases relied upon by petitioners (Pet. 12), *United States* v. *Price*, 288 F.2d 448 (4th Cir. 1961), and *Haughton* v. *Blackships, Inc.*, 462 F.2d 788 (5th Cir. 1972),[5] are not in conflict with the present case. *Price* did not involve the CHAMPUS program. Moreover, the benefits were provided under the Civil Service retirement system

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[3]Petitioners also rely upon the district court opinion in the present case (Pet. 8), but since that decision was reversed by the court of appeals, it obviously provides no basis for further review.

[4]In any event, the disagreement between the present case and *Mooney* does not stem from a dispute over the proper legal analysis. Indeed, the *Mooney* court explicitly stated that the issue "turn[ed] on whether the source from which plaintiff's medical bills were paid is the general revenue of the federal treasury or whether it is from a 'specifically funded source' " (619 F. Supp. at 1529 (citation omitted)). The court's error was its confusion concerning the source of CHAMPUS benefits. The court indicated that "it is unclear whether payments made by CHAMPUS are from a specially funded source," and that counsel for both sides had failed to "shed any light on the issue" (*id.* at 1530). The court in all likelihood would have reached the opposite holding had it understood that CHAMPUS benefits were paid from general revenues rather than from a specially funded source.

[5]Petitioners refer to three additional cases, but they concede that in each of them, the recipient had made a monetary payment into the fund (Pet. 11).

and came from a fund supplied by a mandatory salary deduction that was matched by government contributions. The court emphasized that the fund was "derived in large measure from the contributions of the employees" (288 F.2d at 450; see also *id.* at 451). *Price* is therefore consistent with the present case: there must be *some* monetary contribution from the beneficiary to the government fund for the source to be collateral.

Like *Price*, *Haughton* did not involve any aspect of the CHAMPUS program. Indeed, *Haughton* did not even involve a government defendant. Moreover, while the court in that case held that a benefit fund to which a plaintiff-employee did not contribute was collateral, the reach of the decision is limited by two important considerations. First, the *Haughton* court believed that "[a]pplication of the collateral source rule depends less upon the source of funds than upon the character of the benefits received" (462 F.2d at 790). This approach is contrary to the recent trend of looking to the source of the funds rather than to the purposes of the underlying program in determining if such funds are collateral.[6] It is not clear whether the Fifth Circuit will join the modern trend.

Second, the *Haughton* court distinguished between benefits provided from a source voluntarily funded by the defendant-employer and those provided by the employer (as was the case in *Haughton*) pursuant to a collective bargaining agreement with the employee-beneficiary's union. The court specifically noted that "an employer-tortfeasor who voluntarily undertakes to indemnify itself

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[6]The Tenth Circuit pointed out this trend in *Berg*. The court noted that the first federal case to consider the collateral source rule in an FTCA action had analyzed the legislative history and purposes behind the payments, but that subsequent court of appeals cases "have focused on the source of the payments received by the plaintiff" (806 F.2d at 984-985 n.4 (citing cases)).

against liability by payment into a fund for that purpose, should not be penalized by permitting the plaintiff a double recovery of his benefits under the fund as well as his full measure of damages" (462 F.2d at 791).

The CHAMPUS program was not the result of collective bargaining; the government did not provide coverage in exchange for some concession on the part of servicemen. Thus, it would appear that under the reasoning of *Haughton*, CHAMPUS benefits would *not* be viewed as a collateral source.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

MAY 1987